

FILED

MAY 10 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER) Nos. 04-0507, 04-0732
OF THE STATE BAR OF ARIZONA,)

BRIAN E. FINANDER,
Bar No. 007739

RESPONDENT.

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The State Bar filed a Complaint on December 9, 2004. Respondent did not file an answer and through motion sought a 30 day extension for filing an answer. The Respondent's answer was due on March 2, 2005. On March 3, 2005, Respondent filed another motion seeking a nine day extension for filing an answer. Rule 57(b) specifically limits the authority of the Hearing officer to grant an extension beyond the prescribed 30 days previously granted to the Respondent.

The Disciplinary Clerk entered a Default on March 11, 2005. A hearing on aggravation and mitigation was held on April 14, 2005. During the hearing, Respondent appeared without counsel and indicated that he felt that he had ample opportunity to retain counsel to represent him in the aggravation and mitigation hearing. Neither side called any witnesses in the hearing.

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1. At all times relevant hereto, Respondent was a member of the State Bar of Arizona having been admitted to practice on May 14, 1983.

2. In or about July 2003, Thomas P. McVay filed a civil law suit (CV 2003-014064) in Maricopa County Superior Court against his former client(s) Robin Sullivan and/or Bobby Sullivan. Thomas McVay ("Mr. McVay") was represented by attorney Robert Yen ("Mr. Yen").

4. In or about December 2003, Respondent filed a motion styled an “Omnibus Motion” with the Court in which he sought to have a previously granted default judgment set aside, vacate previously imposed sanction(s) and a previously granted preliminary injunction.

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1 6. Mr. Yen, upon receipt of the motion and certificate on December 29,
2 2003, noted that the envelope in which it was received was postmarked December
3 27, 2003.
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5 7. Mr. Yen thereafter filed a motion requesting an extension of time to file
6 a response to Respondent's Omnibus Motion as well as filing a motion for
7 sanctions pursuant of Rule 11, A.R.C.P.
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9 8. In his response to Mr. Yen's motions filed with the Superior Court,
10 Respondent denied either directly or by implication that the envelope was from
11 him. Respondent knew that his statement(s) were false.
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13 9. Respondent alleged that Mr. Yen was at a minimum, negligent in his
14 handling of the envelope and its contents in his allegations to the Court
15 responding to Mr. Yen's motion for sanctions.
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17 10. Upon direct inquiry by the Court in the matter, Respondent admitted
18 that the envelope was his.
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20 COUNT TWO (04-0732)

21 11. In or about July 2003, Thomas P. McVay (Mr. McVay") filed a civil
22 suit (CV 2003-014064) in Maricopa County Superior Court against Robin
23 Sullivan and/or Bobby Sullivan.
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25 12. In or about December 2003, Respondent began representing Robin and
/or Bobby Sullivan in CV2 003-014064.

1 13. In or about December 2003, Respondent filed a motion styled an
2 "Omnibus Motion" with the Court in which he sought to have a previously
3 granted default judgment set aside, vacate previously imposed sanction(s) and a
4 previously granted preliminary injunction.
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6 14. After reviewing the Omnibus Motion and hearing the arguments of
7 counsel, minute entry dated March 3, 2004 (filed March 5, 2004) the Honorable
8 Peter C. Reinstein, Superior Court Judge, denied Respondent's motion and found
9 that "...given the actions and the content of the pleadings filed by counsel for
10 Defendants, that Rule 11 A.R.Civ.P. sanctions should be imposed." And ordered
11 Respondent to pay Plaintiff \$250.00.
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13 15. After the Omnibus Motion was denied by the Superior Court,
14 Respondent filed, on or about April 21, 2004, a Petition for Special Action to the
15 Arizona Court of Appeals, Division One.
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17 16. In the Petition for Special Action, Respondent asserted to the Court of
18 Appeals that although Mr. McVay had been awarded a default judgment against
19 Robin Sullivan, a counter- or cross-claim was pending and could legitimately be
20 filed and that there were issues remaining to be litigated. One of the remaining
21 issues asserted as the basis for the Special Action was an alleged bar complaint
22 from the Sullivan's against Mr. McVay. This was not a valid issue because at the
23 time of the Respondent's pleading he knew, or should have known that the bar
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1 complaint had been dismissed and the dismissal was affirmed by the probable
2 cause panelist.

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4 17. In the petition for Special Action, Respondent alleged that there was a
5 constitutional issue of sovereignty regarding the enforceability of an order for Ms.
6 Sullivan to appear as she worked on an Indian reservation. The assertion made
7 about the McVay bar complaint and the availability of Ms. Sullivan were non-
8 meritorious claims.
9

10 CONCLUSIONS OF LAW

11 The facts as deemed admitted above establish that Respondent violated one
12 or more of the Rules of Professional Conduct as follows:
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14 18. **COUNT ONE (04-0507):** Respondent violated Rule 42, Ariz. R. S.
15 Ct., specifically, ER 3.3, ER 4.4, ER 8.4(c), and ER 8.4(d). Respondent
16 knowingly made a false statement of material fact to the tribunal and /or failed to
17 correct a false statement of fact previously made to the tribunal (ER 3.3);
18 Respondent used means that had no substantial purpose other than to embarrass,
19 delay or burden another person (ER 4.4); Respondent engaged in conduct
20 involving dishonesty, fraud, deceit or misrepresentation (ER 8.4(c)) and
21 Respondent engaged in conduct that is prejudicial to the administration of justice
22 (ER 8.4(d)).
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1 **19. COUNT TWO (04-0732):** Respondent violated Rule 42, Ariz. R. S.
2 Ct., specifically, ER 3.1, ER 3.3, ER 4.1 and ER 8.4(d). Respondent brought the
3 Special Action before the Court of Appeals when there was no good faith basis in
4 law and fact for doing so and included frivolous argument for the basis of the
5 Special Action (ER 3.1); Respondent knowingly made a false statement of
6 material fact to the tribunal and /or failed to correct a false statement of fact
7 previously made to the tribunal (ER 3.3); Respondent made a false statement of a
8 material fact to the Court of Appeals in support of his Petition for Special Action
9 (ER 4.1); and Respondent engaged in conduct that is prejudicial to the
10 administration of justice (ER 8.4(d)).

14 **ABA STANDARDS**

15 The ABA *Standards* list the following factors to consider in imposing the
16 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
17 actual or potential injury caused by the lawyer's misconduct, and (4) the existence
18 of aggravating or mitigating circumstances. ABA *Standard* 3.0.

20 This Hearing Officer considered *Standard* 6.13 (False Statements, Fraud,
21 and Misrepresentation) and 6.23 (Abuse of the Legal Process) in determining the
22 appropriate sanction warranted by Respondent's conduct.
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AGGRAVATING AND MITIGATING FACTORS

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. A number of factors are present in aggravation:

a.) 9.22(d) multiple offenses: The Respondent engaged in a series of acts arising out a single representation of the Sullivan matter. His first series of violations of the disciplinary rules occurred in Superior Court, and his second series of actions occurred in his appeal of the Superior Court default in the Court of Appeals;

b.) 9.22(e) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency: Respondent failed to timely file an Answer to the Complaint after seeking an extension of time to file. After the due date for the Answer, he sought another extension of time in which to file an Answer. When the request for another extension was denied by this Hearing Officer, and set the time for the aggravation and mitigation hearing, Respondent missed the deadline for submitting his list of witnesses and exhibits. Furthermore, after additional time was granted for him to submit a list of witnesses, he continued to amend his list after the due date. At each step of this

1 disciplinary proceeding, Respondent has resisted compliance with
2 the disciplinary rules or this Hearing Officer's orders.

3 c.) 9.22(g) refusal to acknowledge wrongful nature of conduct:
4 Respondent stated in the hearing that he did not think he engaged in
5 conduct that was inappropriate given the circumstances. In reference
6 to Count One, he did not understand why he was sanctioned by the
7 Superior Court, and he seems to believe that when the Court of
8 Appeals denied his petition for Special Action, the decision would be
9 overturned on appeal. Also, Respondent indicated that he did not
10 feel that his conduct warranted this disciplinary proceeding; and

11 d.) 9.22(i) substantial experience in the practice of law: Respondent
12 has been a member of the Arizona Bar since May of 1983. Although
13 he has no prior disciplinary history, he seems to be suffering from an
14 eroding understanding of the standards of duty that are required of
15 members of the bar. Because of the Respondent's experience, he
16 knew or should have known of the consequences of his actions.

17 There is only one applicable mitigating factor relevant in this matter, which
18 is 9.32(a) absence of a prior disciplinary record. As stated above, Respondent
19 had not been a subject of any prior disciplinary action.
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PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. In re Shannon, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994), (quoting In re Wines, 135 Ariz. 203, 207 (1983)). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. Matter of Riley, 142 Ariz. 604, 615 (1984).

The proportionality of the penalty is appropriate in light the following precedent disciplinary matters:

In re Hansen, 179 Ariz. 229, 877 P.2d 802, (July 14, 1994): A prosecutor had dismissed a witness for a trial. When the judge convened the trial, the prosecutor failed to tell the court or the defense counsel that she had dismissed the witness. She represented to the court and to her supervisor that the witness was not available, and never disclosed that she was the cause of the witness's unavailability. She received the discipline of censure. The aggravating factors considered in support of this sanction included dishonest or selfish motive. Although, the *Hansen* misconduct had more onerous consequences than this case, the mitigating factors for attorney *Hansen* are applicable. In *Hansen*, the attorney had no prior disciplinary history, cooperated with the disciplinary proceedings,

1 and was inexperienced in the practice of law. Attorney Hansen also resigned her
2 employment and showed remorse during the disciplinary proceeding. The
3 Respondent in this case has extensive experience in the practice of law and no
4 prior disciplinary record.
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6 In Re Fee, 182 Ariz. 597, 898 P.2d 975 (1995): The Arizona Supreme
7 Court determined that two attorneys deserved the sanction of censure for their
8 lack of candor to a judge during a settlement hearing. The Supreme Court
9 reversed the hearing committee's recommendation for a 30-day suspension and
10 the disciplinary commission's recommendation of a 60-day suspension. The
11 attorneys were disciplined for failing to disclose a settlement fee arrangement to
12 the court. In determining the appropriate sanction, it was determined that there
13 were no aggravating factors and several mitigating factors. The absence of a
14 prior disciplinary record, the lack of a dishonest or selfish motive and the full
15 disclosure to the disciplinary authorities were all taken into account as mitigating
16 factors. The *Fee* case offers some guidance due to the similarities in facts and the
17 similar mitigating factors. In the present case and the *Fee* case, the actions that
18 gave rise to the discipline occurred when the attorneys used bad judgment in an
19 attempt to zealously represent their respective clients. While the Respondent may
20 not have had a dishonest or selfish motive, his actions seemed to be based on a
21 negligent understanding as to the appropriate procedures to adjudicate his clients'
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1 interests. Also, while the attorneys' conduct in the *Fee* matter could have resulted
2 in prejudice or harm to their client, no actual harm occurred since the Supreme
3 Court found that the settlement terms were otherwise reasonable. The
4 Respondent's conduct in Count One could have also resulted in prejudice and had
5 the potential for harm to the opposing counsel because the mail certification
6 notice triggered important deadlines for responsive pleadings. Had the court not
7 allowed the additional time for filing the responsive pleadings, the opposing
8 counsel would have been disadvantaged in the case. In reference to Count Two,
9 the potential for harm was the cost Mr. McVay incurred in responding to the
10 Special Action in the Court of Appeals, and the Court of Appeals was required to
11 incur the expense and time to respond to the Petition for Special Action. At the
12 least, this cost would be within a reasonable scope of the estimated costs the *Fee*
13 court incurred in addressing the consequences of the failed settlement conference.
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18 RECOMMENDATION

19 The purpose of lawyer discipline is not to punish the lawyer, but to protect
20 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
21 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
22 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
23 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
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1 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
2 (1994).

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4 In imposing discipline, it is appropriate to consider the facts of the case, the
5 American Bar Association's *Standards for Imposing Lawyer Sanctions*
6 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
7 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

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9 Upon consideration of the facts, application of the *Standards*, including
10 aggravating and mitigating factors, and a proportionality analysis, this Hearing
11 Officer recommends the following:

12 1. Respondent shall be censured.

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14 2. Respondent shall be placed on probation for a period of two years
15 effective upon the signing of the probation contract. Bar Counsel shall notify the
16 Disciplinary Clerk of the date of commencement.

17 a.) Respondent shall also enroll in and successfully complete the
18 Members' Assistance Program (MAP) assessment.

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20 b.) Respondent shall enroll in and successfully complete the Ethics
21 Enhancement Program.

3. Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 10th day of May, 2005.

Yvonne R. Hunter
Yvonne R. Hunter
Hearing Officer 8P

Original filed with the Disciplinary Clerk
this 10th day of may, 2005.

Copy of the foregoing was mailed
this 10th day of May, 2005, to:

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